

Claimant originally appeared by and through his attorney, Lawrence M. Gurney who withdrew as counsel for claimant effective June 3, 1997. Hereinafter claimant is represented by Mr. James T. McIntyre of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Richard A. Boeckman of Great Bend, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as contained in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the Appeals Board considers the December 20, 1996, opinion of the Kansas Court of Appeals and the record on appeal.

ISSUES

- (1) The average weekly wage of claimant on the date of injury.
- (2) The nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Appeals Board upon remand from the Kansas Court of Appeals which, in its decision of December 20, 1996, reversed the Workers Compensation Appeals Board regarding the computation of the time period allowed under K.S.A. 44-551 for appeals from administrative law judge decisions to the Workers Compensation Appeals Board. The Court of Appeals, citing K.S.A. 44-551 and K.A.R. 51-18-2, found that the application of K.S.A. 60-206(a) is not limited to civil actions but also applies to any statutorily prescribed periods of time where "the method for computing such time is not otherwise specifically provided." The Court of Appeals found the method of computing a ten-day period under Chapter 60-206 applies in workers compensation litigation.

While the Court of Appeals paid substantial attention to K.A.R. 51-18-2, no mention was made of K.A.R. 51-17-1 which states:

"Saturdays, Sundays and holidays excluded. The time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be a Saturday or Sunday or a statutory holiday, it is to be excluded."

This regulation which was authorized and made effective in January 1966 and amended in January 1, 1973, was not mentioned by the Kansas Court of Appeals although it does appear applicable in this circumstance. However, as the opinion of the Court of Appeals is the law of this case, the Workers Compensation Appeals Board will proceed accordingly.

Two issues are brought before the Appeals Board from the original Award of Judge Richardson of April 28, 1995. The Appeals Board will first consider the claimant's average weekly wage.

Claimant worked for respondent as a truck driver and swamper, moving oil rigs. At the time of his injury he was earning \$8 per hour and was a full time regular employee. This hourly rate computes to a 40 hour straight time wage of \$320 per week. The evidence presented indicates claimant earned \$882.43 in overtime during the 26 weeks preceding the date of claimant's accident, yielding an additional \$33.94 per week. Respondent's information shows contributions of \$103.46 per month to claimant's health insurance which computes to an additional \$23.88 per week for a total average weekly wage of \$377.82. Claimant alleges additional weekly allowances for meals at the rate of \$13 for a full day and \$7 for a partial day. However, the evidence presented shows a total of \$260.04 paid to claimant during the 26 weeks preceding claimant's date of accident. This would generate an additional \$10 per week, if this meal allowance is allowable as part of the average weekly wage under K.S.A. 44-511.

K.S.A. 44-511(a)(2)(C) does allow for additional compensation including board and lodging when furnished by the employer as part of the wages. Black's Law Dictionary, 4th Edition defines "board" as a verb, meaning to receive food or a reasonable compensation, either with or without lodging. Webster's II New College Dictionary defines "board" as to "furnish with meals in return for pay." While the word is sometimes extended to include lodging, the primary meaning of the word "board" is "furnished food." Leslie v. Reynolds, 179 Kan. 422, 295 P.2d 1076 (1956). In Leslie the Supreme Court was asked to consider whether respondent's agreement to furnish to claimant an unlimited amount of meat, eggs, milk, butter and garden produce for the family's use would be considered as board as indicated in G.S. 1949, 44-511. In Leslie the Supreme Court found this agreement to furnish this food stuff did not constitute "board" within the meaning of the statute but went on to state that its money rate was properly ascertained and included by the District Court when it computed appellee's average weekly wage. The Supreme Court went on to state that since the money rate of such items as board and lodging is ascertainable, then it should be considered in determining the wage rate of the employee.

In this instance, the Appeals Board finds the \$260.04 paid to claimant during the 26 weeks preceding claimant's accidental injury are food stuffs and as such constitute board under the meaning of K.S.A. 44-511 and should be included in claimant's average weekly wage. This additional \$10, when added to claimant's average weekly wage, results in an average weekly wage of \$387.82.

With regard to the nature and extent of claimant's injury and/or disability, the dispute hinges upon whether claimant's injury is limited to his left lower extremity or whether it encompasses claimant's back. Claimant was examined and/or treated by several physicians in this matter. Both C. Reiff Brown, M.D., an orthopedic surgeon, and Ernest R. Schlachter, M.D., a general practitioner, had the opportunity to examine claimant. Dr. Brown, an independent medical examiner appointed by the administrative law judge, felt claimant suffered a crush type injury to the left lower extremity and opined claimant had suffered a 21 percent permanent partial loss of use of his left leg. Dr. Brown did not feel claimant required permanent work restrictions or permanent limitations as a result of any

involvement to claimant's back. He also felt there was no objective evidence of permanent impairment as a result of claimant's alleged back injury and placed no restrictions upon claimant stemming from this alleged back injury.

Dr. Schlachter was asked to provide an independent medical examination by claimant's attorney. Dr. Schlachter noted that claimant had symptomatology to the leg and walked with a slight limp. However, at the time of Dr. Schlachter's examination in August 1992, some 14 months after claimant's date of accident, he noted claimant had no complaints to the low back. Dr. Schlachter felt that the complaints to claimant's hips were subjective in nature and necessitated no functional impairment and no restrictions of any kind. Dr. Schlachter assessed claimant a 35 percent functional impairment to the left lower extremity.

David G. Shivel, M.D., a family practitioner, was claimant's family doctor since claimant was a small child. Dr. Shivel opined that claimant's persistent back problems were directly related to and caused by his abnormal gait resulting from the left leg injury. Dr. Shivel felt that claimant's altered gait due to the left lower extremity injury which he called very evident, was a direct causational factor in the resulting low back complaints. Dr. Shivel felt claimant should be limited to dealing with weights of 50 pounds or more and should avoid bending, stooping, squatting, and kneeling activities. Dr. Shivel acknowledged claimant's complaints to the low back were subjective in nature and also admitted he was unaware of what physical work activities claimant was involved at the time of his examination.

Claimant was also examined and treated by Leonard T. Fleske, M.D., an orthopedic surgeon in Great Bend, Kansas. Dr. Fleske treated claimant through September 1991 at which time he released him with the only restriction being he could not do any climbing. He had the opportunity to examine claimant on two other occasions, once for claimant's leg in November 1991 and once for his low back in January 1992. After these examinations he assessed claimant a 20 percent impairment to claimant's left lower extremity. Dr. Fleske did feel that claimant's limp contributed to his low back sprain but would add no additional restrictions as a result.

The Appeals Board also considered the opinions of Mr. Steve Manning, general manager of Amerine Services for whom claimant began working in May 1994 and Mr. Terry Stueder, owner of Stueder Contractors, Incorporated for whom claimant worked from June 1993 through June 1994. Both Mr. Manning and Mr. Stueder acknowledged claimant worked for them as a plumber's helper, a physically active job. Both agreed claimant regularly lifted 30 to 50 pounds and was involved in bending, stooping, kneeling, squatting, and crawling on a regular basis. Claimant's job activities would sometimes require that he get into small spaces, while at other times he would be working in the open. Neither recalled claimant ever walking with any type of limp or complaining at any time about his back being bothered by his job activities.

In proceedings under the Workers Compensation Act the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends. This burden must be established by a preponderance of the credible evidence. See K.S.A. 1990 Supp. 44-501 and 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony which may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Claimant alleges an ongoing involvement with his low back stemming from the left lower leg injury of June 30, 1991. The medical evidence is in dispute regarding the significance of claimant's back complaints. While the doctors disagree regarding whether claimant has ongoing back symptoms subsequent to his leg injury, they all agree that claimant's complaints are subjective in nature and, of the four doctors who have examined claimant, only one provides any significant restrictions to claimant's low back. It is also significant that the work restrictions placed upon claimant by Dr. Shivel, including bending, stooping, squatting, and kneeling, are substantially similar to the work requirements described in claimant's jobs with Stueder Contractors, Incorporated and with Amerine Services, both jobs which claimant has shown the ability to perform for a substantial period of time subsequent to the injury.

When considering the evidence presented, including the medical testimony and the testimony of Mr. Stueder and Mr. Manning, the Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that he suffered any permanent injury to his low back as a result of the left leg injury of June 30, 1991. While claimant exhibited a limp while being examined by the various physicians, this limp was not present during the year he worked for Mr. Stueder and the several month period he worked for Mr. Manning.

This would indicate that any involvement to claimant's low back was, at worst, a temporary situation for which no permanency can be assessed. Therefore, the Appeals Board finds that as a result of the June 30, 1991, date of accident, claimant has suffered permanent injury to his left leg only, and is entitled to compensation pursuant to K.S.A. 44-510d.

The Administrative Law Judge in considering the opinions of the various physicians regarding claimant's functional impairment to his left leg found claimant entitled to the highest rating available, that being the 35 percent functional impairment to the left leg provided by Dr. Schlachter. Respondent, in its brief to the Appeals Board, found that Judge Richardson's finding in assessing claimant the highest functional impairment "is correct." Therefore, the Appeals Board finds claimant entitled to a 35 percent functional impairment to the left leg as a result of the injury suffered on June 30, 1991.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein. Additional issues raised before the Administrative Law Judge but not appealed to the Workers Compensation Appeals Board are hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson dated April 28, 1995, should be, and is hereby, modified with regard to claimant's average weekly wage and affirmed with regard to the functional disability awarded, and claimant, Michael K. McIntyre, is granted an award of compensation against the respondent, A. L. Abercrombie, Inc., and its insurance carrier, Fireman's Fund Insurance Company, for an accidental injury occurring on June 30, 1991.

Claimant is entitled to 10.29 weeks temporary total disability compensation based upon an average weekly wage of \$387.82 at the rate of \$258.56 totaling \$2,660.58 followed thereafter by 66.4 weeks permanent partial disability at the rate of \$258.56 per week in the amount of \$17,168.38 for a total award of \$19,828.96 all of which is due and owing and ordered paid in one lump sum minus amounts previously paid.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Susan Maier	
Transcript of Regular Hearing	\$137.97
Underwood & Shane	
Deposition of Michael McIntyre	\$190.20
Deposition of Dr. Shivel	\$176.50
Deposition of Dr. Brown	\$209.25
Ireland Court Reporting	
Deposition of Michael McIntyre	\$139.90
Deposition of Jerry Hardin	\$232.30
Deposition of Leonard Schuckman	\$182.70
Kelley, York & Associates	
Deposition of Dr. Schlachter	\$110.75
Deposition of Dr. Fleske	\$110.51

Deposition of Terry Stueder
Deposition of Steve Manning

\$113.20
\$113.20

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard A. Boeckman, Great Bend, KS
James T. McIntyre, Wichita, KS
Lawrence M. Gurney, Wichita, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director